**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**APPEAL NO. 33875**

**STATE OF WEST VIRGINIA *ex rel***
**JANE L. CLINE, Insurance Commissioner of the State of West Virginia,**

**Petitioner,**

**vs.**

**THE HONORABLE ANDREW N. FRYE, JR.,**
**Judge of the Circuit Court of Grant County,**
**GERRY A. DAVIS, SR., DANNY KEPLINGER, TIMOTHY ROHRBAUGH, MONUMENTAL LIFE INSURANCE COMPANY and WILLIAM BLANKENBECKLER,**

**Respondents.**



**RESPONSE TO ISSUANCE OF RULE FROM GERRY A. DAVIS, SR., DANNY KEPLINGER, AND TIMOTHY ROHRBAUGH, ET AL**

Respectfully Submitted,

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## I. INTRODUCTION & NATURE OF THE RULING IN THE LOWER COURT

Gerry A. Davis, Sr., Danny Keplinger, and Timothy Rohrbaugh are three of the named Plaintiffs in three separate Grant County lawsuits which have been consolidated for trial.[1] The consolidated actions allege, *inter alia,* multiple acts of misconduct of an insurance agent including fraud, misrepresentation, churning, and embezzlement of monthly insurance premiums collected from the Plaintiffs at their homes. The agent was William Blankenbeckler, a captive insurance producer (agent) of Monumental Life Insurance Company (hereafter Monumental) and the companies it acquired and succeeded in the late 1990's, Peoples Life Insurance Company (hereafter Peoples Life), and Peoples Security Life Insurance Company (hereafter Peoples Security). The consolidated actions also allege (1) vicarious liability of Monumental by reason of the captive status of its agent and (2) separate claims of company liability for failure to train, supervise and properly audit the agent. The Plaintiffs seek both compensatory and punitive damages from Blankenbeckler and Monumental.

The Plaintiffs in the consolidated civil actions and Monumental, both notified the West Virginia Insurance Commissioner in 2004 of the fraudulent acts of Blankenbeckler. It is believed that thereafter the office of the West Virginia Insurance Commissioner began an investigation in the acts of Blankenbeckler, and possibly his employer. The investigation resulted, apparently, in an Agreed Order, entered January 7, 2005 by Commissioner Jane L. Cline. A copy of the Agreed Order is attached hereto as Addendum A. No information about the investigation nor its resulting Agreed Order were provided to the Plaintiffs until 2006.

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[1] The Plaintiffs in the first action are Gerry A. Davis, Sr., Karen F. Davis, Gerry A. Davis, Jr., and Kimberly Davis (Civil Action No. 04-C-13); the second, Danny Keplinger and Sharon Keplinger, individually, and as parents and next friends of Wesley L. Keplinger and Lesley A. Keplinger, minors (Civil Action No. 14-C-91); and the third, Timothy L. Rohrbaugh and Dawn E. Rohrbaugh, Dareck W. Kuykendall and Heather Kuykendall Pumphrey (Civil Action No. 05-C-28). Although the Petitioner in this proceeding neglected to include most of the Plaintiffs as Respondents, this Response is filed on behalf of all Plaintiffs.

In February, 2006, Plaintiffs' counsel contacted the Consumer Advocate in the Commissioner's office and inquired as to the status of the investigation. The Consumer Advocate shortly thereafter produced a copy of the Agreed Order entered in January, 2005. The Order states that Blankenbeckler and the Commissioner had entered into a consent agreement under which Blankenbeckler admitted to the misappropriation of more than $14,000.00 in premiums and he also admitted to various other types of misconduct as an agent including misrepresentation.

Sometime thereafter, counsel for Monumental made a FOIA request to the West Virginia Insurance Commissioner regarding the investigation into Blankenbeckler's misconduct and received only a copy of the Agreed Order.

Both the Plaintiffs and the Defendants wanted to see the full investigation file for various reasons. Assuming the investigation to be fair and impartial, it is important and relevant for many reasons including (1) corroboration of the Plaintiffs' statements and position; (2) corroboration of the Defendants' statements and position; and (3) because William Blankenbeckler in the course of his deposition admitted certain things (the embezzlement), but denied some of the very things he agreed to in the Agreed Order, including particularly misrepresenting the terms of the policies sold to the Plaintiffs. It appeared from a reading of West Virginia Code §33-2-19 that it was appropriate to ask the Circuit Court to order the production of the file.

In August of 2007, the Plaintiffs and the Defendants jointly requested that the Grant County Circuit Court issue an ORDER directing the West Virginia Insurance Commissioner to turn over all records regarding the investigation. The Court granted the requests and entered such an order on August 22, 2007. A copy of the August 22, 2007 Order is attached hereto as Addendum B.

In September of 2007, counsel for the Insurance Commissioner filed a Motion to Intervene in the Grant County consolidated civil actions. A copy of the Motion to Intervene is attached hereto as Addendum C. On October 10, 2007, the matter was brought on for hearing in Grant County Circuit Court. The Court allowed counsel for the Insurance Commissioner to make a full and through argument as to why the Commissioner should not have to release copies of any documents

contained within the investigation file. Judge Frye and his clerk considered the arguments, finally issuing an Order on December 10, 2007, again granting the motion of the Plaintiffs and Monumental and ordering the West Virginia Insurance Commissioner to turn over the records of the investigation into Blankenbeckler's actions. A copy of the December 10, 2007 order is attached hereto as Addendum D. It is this December 10, 2007 Order that the Insurance Commissioner seeks to prohibit.

## II. STATEMENT OF FACTS OF THE CASE

Throughout the various mergers and acquisitions, William Blankenbeckler was an exclusive agent of Peoples Life, Peoples Security, and finally Monumental. Some of the Plaintiffs and their families had insurance policies with Peoples Life and Peoples Security before Blankenbeckler became an agent for the companies, and they continued the relationship with Peoples Life, Peoples Security, and Monumental after he was appointed to serve the Grant County area.

Blankenbeckler's book of business for Peoples Life, Peoples Security, and Monumental, included multiple family collection accounts. In collecting for these accounts, the agent would visit the policy holders' homes each month and physically collect the monthly premiums they owed the insurance company for various insurance policies they owned. Payments were frequently made in cash for which Blankenbeckler would give customers receipts. Additionally, Blankenbeckler sold various types of insurance to his customers including the Plaintiffs. The types of insurance included term life, whole life, interest sensitive life, universal life, accidental death, and cancer policies. Blankenbeckler and the Plaintiffs all resided in Maysville, a very small community in Grant County, West Virginia; Blankenbeckler was a friend of all of the adult Plaintiffs.

The complaints in the underlying actions assert that Blankenbeckler embezzled or pocketed some of the premiums he collected from the Plaintiffs and that he misrepresented the terms of various universal life policies, selling them as "retirement policies" to the Plaintiffs, and representing that the policies would provide a specified level of monthly income to the Plaintiffs during their

retirement. The marketing of these universal life policies as a "retirement plan" or "retirement policy" was a material misrepresentation about the nature of the policy. The universal life insurance policies were solicited and sold during a period from early 1990's until 1997. The misrepresentations began during those initial sales solicitations. The embezzlement of premiums from Plaintiffs admittedly began sometime in the mid-1990's and continued until the year of his termination in 2003. Monumental conducted annual random "audits" of Blankenbeckler's book of business in 1999, 2000, 2001, and 2002[2] and no shortage or embezzlement of premiums was detected from any of the Plaintiffs or any of the other customers until the post-termination final audit in 2004. In the late Summer and early Fall of 2003, Blankenbeckler bounced two personal checks to Monumental. These checks purportedly were for premiums paid by customers which he had "accidentally lost". After the first bounced check, he was given a verbal and written reprimand. After the second bounced check, he was terminated for "mishandling company funds". He was terminated effective October 31, 2003.

Within a week after Blankenbeckler was terminated, Monumental sent a letter to the office of the Insurance Commissioner (hereafter, Commissioner), advising that he had been terminated as an agent. (A copy of that letter is enclosed herewith as Addendum E) Monumental did not notify any of the Plaintiffs until late December, 2003, that Blankenbeckler no longer worked for it. When it did notify them, it failed to alert them that it suspected he had embezzled their funds. During the interim, Blankenbeckler continued to go to some of the Plaintiffs' homes and collect premiums from them. Customer notification actually occurred while Monumental was conducting a "final audit" of Blankenbeckler's book of business, but the audit was performed by his sales manager and his district manager, not an internal or external auditor. The nature of the audit was questionable. Indeed, in the case of the Davis family, when the sales manager came to the home, he and the agent who replaced Blankenbeckler actually solicited and made the sale of a new life insurance policy to

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[2] Peoples Life and Peoples Security also conducted periodic audits of Blankenbeckler's book of business prior to the merger into Monumental in 1998.

one of the Plaintiffs without ever disclosing the true purpose of their visit or that they suspected Blankenbeckler had embezzled some of the Davis' premiums. It was not until the sales manager demanded to inspect any and all premium receipts still in the possession of the family that Gerry Davis became suspicious that Blankenbeckler had embezzled his premiums. The Davis family contacted counsel and filed their lawsuit in February, 2004.[3]

Shortly after the Gerry A. Davis' lawsuit was filed in February of 2004, counsel for Plaintiffs traveled to Charleston, met with counsel for the West Virginia Insurance Commissioner, Greg Elam (currently listed as counsel in the Petition before this Court), and requested an investigation on behalf of his clients. In April of 2004, an investigator for the Commissioner came to the offices of Plaintiffs' counsel in Parsons. He met with and questioned members of two of the Plaintiffs' families about the conduct of Blankenbeckler and Monumental. The third family (the Rohrbaughs) were also scheduled to be interviewed but could not make the trip to Parsons because of snowy weather. Thereafter, neither the Plaintiffs nor their counsel ever heard back from the Commissioner, the investigator, Mr. Elam, or anyone else in the Commissioner's office regarding the Plaintiffs' complaints to the investigator.

Later in April, 2004, perhaps in response to an inquiry by the office of the Insurance Commissioner, Monumental advised the Insurance Commissioner by letter that it had conducted an audit of Blankenbeckler's book of business and had determined that there were shortages of funds in excess of $14,000.00 from its policy holders. [4] (A copy of the letter is attached herewith as Addendum F)

In February, 2006, Plaintiffs' counsel contacted the Consumer Advocate in the Commissioner's office and inquired as to the status of the investigation involving his clients. The

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[3] The Keplinger and Rohrbaugh lawsuits were filed subsequently. In May, 2007, the three lawsuits were consolidated.

[4] Neither the Plaintiffs nor their counsel were ever provided with copies of the letter, nor were they advised of the communication between Monumental and the Commissioner until the documents were produced in discovery by Monumental.

Consumer Advocate shortly thereafter produced a copy of January 2005 Agreed Order, in which Blankenbeckler and the Commissioner had entered into a consent agreement under which Blankenbeckler admitted to the misappropriation of more than $14,000.00 in premiums and he also admitted to various other types of misconduct as an agent including misrepresentation. (Addendum A)

To date, the Insurance Commissioner has not forwarded to any of the Plaintiffs any information regarding the outcome of the investigation. (The copy of the Agreed Order provided to the Plaintiffs came from the Consumer Advocate.) Nor were the Plaintiffs consulted by the Commissioner regarding either the appropriate action to be taken against Blankenbeckler nor the type of any redress the Commissioner might secure for them for their premium losses and for the damages sustained by them as a consequence of Blankenbeckler's misrepresentations about the policies he sold to them. In fact, the Commissioner did not even mention the Plaintiffs it had interviewed in the Agreed Order. It is also apparent after a review of the Agreed Order of January, 2005, that no provision was included for criminal prosecution.

During discovery in the underlying civil actions, William Blankenbeckler's deposition was taken by counsel for the Plaintiffs. In the Agreed Order of January, 2005, Blankenbeckler admits that he: ".... misrepresented the terms of existing or proposed insurance contracts to the detriment of the applicants or insureds: engaged in patterns of unfair methods of competition or unfair or deceptive acts or practices in the business of insurance; and knowingly and willfully made or permitted false or fraudulent statements or misrepresentations in or relative to applications for policies of insurance." See Addendum A, at page 3. In his deposition, Blankenbeckler denies that he made any misrepresentations to any customers (See: Blankenbeckler Deposition, page 190, lines 3-9, and page 201, lines 12-22. Pages 190 - 205 of Blankenbeckler's Deposition are attached hereto as Addendum G). The information contained within the Insurance Commissioner's file is highly relevant and, will likely corroborate or refute the testimony of Blankenbeckler or the Plaintiffs.

## III. RESPONSE TO PETITIONER'S ASSERTIONS OF WRONG[5]

The Respondents/Plaintiffs below assert that this Court should refuse the writ, and find that Judge Frye's Orders of August and December 2007 were within his authority and discretion and not clearly wrong as a matter of law.

A proper application of the five factors of *Hoover* to the instant case would result in a denial of the writ of prohibition.

West Virginia Code §33-2-19 did not protect the documents or information supplied to the Commissioner in 2004. It should not be applied retroactively to grant protection now.

The insurance agents or producers regulated by the Insurance Commissioner should be granted no greater protection than lawyers, doctors or other professionals when investigating wrongdoing.

This Court should extend privileges only when an interest which society values strongly would be lost without the protection of the privilege.

## IV. STANDARD OF REVIEW

The statutory standard for the review of a writ of prohibition is set out in West Virginia Code §53-1-1, which provides: "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in

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[5] Counsel for the Insurance Commissioner asserts four assignments of error as follows:

- The Respondent Judge has committed substantial, clear cut errors of law and exceeded his authority;
- The Respondent Judge's Orders unfairly infringed upon the privilege and confidentiality of documents provided by statute and further stands to harm the Petitioner in ways that cannot be corrected by appeal;
- The Respondent Judge's error can be resolved independently of any disputed facts; and
- The Respondent Judge's Orders will cause irrevocable harm to the Petitioner and her ability to perform her statutory duties.

controversy, or, having such jurisdiction, exceeds its legitimate powers."

The Circuit Court had jurisdiction over the issues in controversy. The issue to be determined in this writ is whether or not the Circuit Court exceeded its legitimate power in ordering the Commissioner of Insurance to turn over the investigatory file.

The standard to be applied by this Court in determining whether or not a Circuit Court exceeded its legitimate power is set out in Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

> "In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." Syl. pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

The statute giving rise to the controversy is West Virginia Code §33-2-19. Confidentiality of Information. As this matter involves the interpretation of this statute, the applicable standard of review is *de novo*. "We have likewise found that "[w]here the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of statute, we apply a *de novo* standard of review." *Lower Donnally Association v. Charleston Municipal Planning Commission*, 212 W.Va. 623, 575 S.E.2d 233 (2002) page 625, quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

Also to be considered is the standard set out in *Hinkle v. Black*:

> "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syllabus point 1, *Hinkle v.*

*Black,* 164 W.Va. 112, 262 S.E.2d 744 (1979)."

## V. ARGUMENT

### A. Applying the five factors of *Hoover* to the instant case would result in a denial of the writ of prohibition:

Examining the Petition using the five factors of *Hoover* should result in the following findings:

(1) Does the Insurance Commissioner have other adequate means to obtain the desired relief? Perhaps not, arguably the Insurance Commissioner would not have standing to appeal the ultimate jury verdict in the matter below. The jury verdict, if any, would be against Blankenbeckler and/or Monumental, and would not directly impact the Insurance Commissioner. The Insurance Commissioner in her Petition asserts no right of appeal.

(2) Will the Insurance Commissioner be damaged or prejudiced in a way that is not correctable on appeal? No, because the Insurance Commissioner will not be damaged or prejudiced by producing the investigative file as ordered. This is a very specific set of circumstances where none of the parties involved in the investigation object to the production of the documents. The Insurance Commissioner attempts to argue that other insurance companies will object to the production of documents in the future if the Commissioner turns over the currently requested documents. The ruling issued by the Circuit Court in Grant County carefully sets out that the Commissioners argument of privilege was rejected because none of the parties involved in the investigation objected to the production of the documents.

(3) Is the Grant County Circuit Court's order clearly erroneous as a matter of law? No. Judge Frye's Orders of August and December 2007 were within his authority and discretion.

Applying the standard from *Hinkle,* this Court should only grant the writ if it finds that Judge Frye's order contained a "....substantial, clear-cut, legal error plainly in contravention of a clear statutory .... mandate which may be resolved independently of any disputed facts and only [if] .....

there is a high probability that the trial will be completely reversed if the error is not corrected in advance."

West Virginia Code §33-2-19 Confidentiality of information, provides:

> (a) Documents, materials or other information in the possession or control of the commissioner that are obtained in an investigation of any suspected violation of any provision of this chapter or chapter twenty-three of this code are confidential by law and privileged, are not subject to the provisions of chapter twenty-nine-b of this code and are not open to public inspection. The commissioner may use the documents, materials or other information in the furtherance of any regulatory or legal action brought as a part of the commissioner's official duties. The commissioner may use the documents, materials or other information if they are required for evidence in criminal proceedings or for other action by the state or federal government and in such context may be discoverable only as ordered by a court of competent jurisdiction exercising its discretion.
>
> (b) Neither the commissioner nor any person who receives documents, materials or other information while acting under the authority of the commissioner may be permitted or required to testify in any private civil action concerning any confidential documents, materials or information subject to subsection (a) of this section except as ordered by a court of competent jurisdiction. *W. Va. Code §33-2-19(a) & (b)*

A plain and straightforward reading of §33-2-19(b) permits a court of competent jurisdiction and only a court of competent jurisdiction, to require that the Commissioner testify in a private civil action concerning the documents collected or generated by the Commissioner in an investigation of a suspected violation. The legislature would not create specific authorization for a court to require the testimony of the Commissioner regarding the documents in a private civil action, if the documents themselves were not permitted to be introduced into the civil action. In fact, other sections of the code specifically permit the disclosure of such information. See for example: West Virginia Code §33-2-9, which governs the examination of insurers, agents, brokers and solicitors. West Virginia Code §33-2-9(i)(7) states:

> Nothing contained in this section may be construed to limit the commissioner's authority to use and, if appropriate, to make public any final or preliminary examination report, any examiner or company workpapers or other documents or any other information discovered or developed during the course of any examination, analysis or review in the furtherance of any legal or regulatory action which the commissioner may, in his or her sole discretion, consider appropriate. West Virginia Code §33-2-9(i)(7)

Reading both sections together, it appears that the Commissioner may make the information she discovers public, if she considers it to be appropriate. As there is no clear statutory mandate

prohibiting the use of the documents in a private civil action, the first portion of the standard set out in *Hinkle* which requires a legal error plainly in contravention of a clear statutory mandate, is not met.

The second criteria set out in Hinkle, that there be "....a high probability that the trial will be completely reversed if the error is not corrected in advance" is not present either. In this instance we have both parties to the underlying civil action requesting production of the documents. If the documents are produced in response to the joint motion of the parties, neither party will have standing to appeal or request a reversal.

(4) Is the Grant County Circuit Court's order is an often repeated error or does it manifest persistent disregard for either procedural or substantive law? No. The Petitioner does not assert so.

(5) Does the order of the Grant County Circuit Court raise a new and important problem or issue of law of first impression? This does appear to be an issue of first impression, however as is indicated below Subsection (a) of §33-2-19 was just written and promulgated in 2007. It does not raise a new or important problem because it is limited by the facts underlying it. The only issue determined by the order of the Grant County Circuit Court is that where none of the parties to an investigation by the West Virginia Insurance Commissioner object to the production of documents contained in the Commissioner's investigation file in a related civil action, the Commissioner should produce the investigation file.

**B. The documents and information sought by the Respondents were not protected by West Virginia Code §33-2-19 when the documents or information were provided to the Insurance Commissioner.**[6]

West Virginia Code §33-2-19 was substantially modified and re-written in 2007. Paragraph (a) of §33-2-19 did not even exist in 2004 when the investigation into Blankenbeckler's actions occurred. In 2004 when the Insurance Commissioner was collecting the information, West Virginia Code §33-2-19 contained only one paragraph applying primarily to the exchange of information with the National Association of Insurance Commissioners.[7] There is nothing within the new §33-2-19 which applies it retroactively to information gained prior to the revision and

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[6] The undersigned Respondent should point out to this Court that counsel for the Insurance Commissioner could have asserted the confidentiality granted to the Commissioner by West Virginia Code §§33-12-25(f)(1) and (2) which appear to apply in the limited circumstance of investigations which result only from the notice of an insurer that an agent has been terminated for cause. In this instance, the Commissioner received notice of Blankenbeckler's wrongdoing from the Respondent/Plaintiffs below in addition to the insurer. Even if the confidentiality of §33-12-25(f)(1) were to be applied, the use of the word 'may' within the section "....may not be subject to subpoena, and may not be subject to discovery or admissible in evidence in any private civil action" [emphasis supplied], appears to grant discretion to the Commissioner or to a Circuit Court. Furthermore, the confidentiality granted therein may only apply to the letter of termination issued by Monumental which has already been produced by Monumental. West Virginia Code §33-2-19 is actually gives more discretion to a Circuit Court.

[7] Prior to 2007, West Virginia Code §33-2-19 read as follows: In order to assist the commissioner in the regulation of insurers in this state, it is the duty of the commissioner to maintain, as confidential, and to take all reasonable steps to oppose any effort to secure disclosure of, any documents or information received from the National Association of Insurance Commissioners, federal banking agencies or insurance departments of other states which is confidential in such other jurisdictions. It is within the power of the commissioner to share information, including otherwise confidential information, with the National Association of Insurance Commissioners, the Board of Governors of the Federal Reserve System or other appropriate federal banking agency or insurance departments of other states: Provided, That such other jurisdictions agree to maintain the same level of confidentiality as is available under this statute and to take all reasonable steps to oppose any effort to secure disclosure of the information. "Federal banking agency" means the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Board of Governors of the Federal Reserve System or the Federal Deposit Insurance Corporation as set forth in section three of the Federal Deposit Insurance Act.

expansion of §33-2-19 in 2007. As the information within the investigation file was not protected by statute when collected, the Commissioner should not now be permitted to assert the protections of a newly passed statutory protection.

**C. The insurance agents or producers regulated by the Insurance Commissioner should be granted no greater protection than lawyers, doctors or other professionals when investigating wrongdoing.**

It is appropriate to consider how other regulatory agencies handle information gained during an investigation of alleged wrongdoing.

The West Virginia Board of Medicine makes all disciplinary actions public information including availability on the internet. See: www.wvdhhr.org/WVbom/disciplinary.asp a copy of which is attached hereto as Addendum H. When the investigation into the conduct of a doctor alleged to have violated the West Virginia Medical Practice Act, and/or the Rules of the West Virginia Board of Medicine rises to the level of a hearing (which can be requested by any party making or responding to a complaint) the hearings are public hearings. 11 CSR 3-11.5(f).

The same is true of hearings regarding alleged wrongdoing by an attorney. Rule 3.6 of Lawyer Disciplinary Procedure provides as follows: "Except where otherwise provided for by these rules, the provisions of the West Virginia Rules of Evidence shall govern proceedings before the Hearing Panel. Hearings conducted by a Hearing Panel ***shall be open to the public.***" [boldface italics emphasis added]

Similarly, if a certified public accountant is denied a licence or the West Virginia Board of Accountancy seeks to pull his licence because of some alleged wrongdoing, and any party to the complaint proceeding requests a hearing, that hearing is open to the public. 1 CSR 2-3.10(h).

There is no public policy reason that the acts of insurance agents (or producers as they are termed by the Commissioner) should be shielded from public scrutiny any more so than the acts of doctors, lawyers, or public accountants.

Society's interest in creating regulatory agencies such as the office of the West Virginia Insurance Commissioner is the protection of the public. In West Virginia Code §33-2-1, et seq, the Commissioner is specifically "...authorized to promulgate and adopt such rules and regulations ....to protect and safeguard the interests of policyholders and the public of this State". W.Va. Code §33-2-10.

The Commissioner argues that the public is best protected by allowing her to hold the investigative file in complete confidence, revealing it to no one, even those who contributed to the investigation, and now consent or do not object to its production. Her reasoning is that if she produces this one file, it could have a chilling effect on the compliance of insurance companies in the future. ".... production of the investigative file could make it difficult in the future for the Petitioner to perform her statutory duties because insurance companies will not be able to rely on the confidentiality provision of W. Va. Code §33-2-19." Petitioner's Memorandum, at page 7, [emphasis added.] As is stated above, the insurance company in the underlying matter specifically moved the Court to order the Insurance Commissioner to produce the file. Again, the particular circumstances of this case limit the applicability of the Commissioner's arguments.

**D. This Court should extend privileges only when an interest which society values strongly would be lost without the protection of the privilege.**

Respondent Monumental's Response discusses thoroughly legal authorities and the doctrine of privilege. Rather than duplicate the effort, this Respondent invites the Court to examine what societal value is protected by allowing the Insurance Commissioner to keep her investigations into the wrongdoing of insurance agents out of the public eye. Historically, privileges are based in protecting our values, for example - marriage (which allows or allowed a spouse to keep communications with his/her spouse confidential) or religion (which allows a priest to keep his confessions confidential) or the right to counsel (which allows the attorney-client privilege).

The privilege asserted by the Commissioner is also confidentiality. What societal value is this Court protecting if it allows the argument put forward by the Commissioner, which in essence is - "Well, I can't expect an insurance company to terminate an agent or otherwise report any wrongdoing by an agent, if such wrongdoing might be disclosed to the public." Are we sweeping the wrongdoing of insurance agents 'under the rug' to protect the public or to protect the insurance industry? This privilege of confidentiality benefits the insurance industry more than it benefits the rights of the general public and should not be considered as worthy of affirmation or extension by this Court.

## VI. CONCLUSION AND PRAYER FOR RELIEF

The Circuit Court of Grant County acted properly in ordering the investigative file of the West Virginia Insurance Commissioner be produced and disclosed. This Respondent respectfully requests that the Petition for a writ of prohibition be denied and that the matter returned to the Circuit Court for trial.

Respectfully Submitted:

**Gerry A. Davis, Sr., Danny L. Keplinger, Timothy Rohrbaugh, et al,**

By: _____

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**Respondents.**

## CERTIFICATE OF SERVICE

I, Janet D. Preston, counsel for the Plaintiffs, Gerry A. Davis, Sr., Danny L. Keplinger, and Timothy Rohrbaugh, et al, do hereby certify that I have filed an original and nine copies of the foregoing **RESPONSE TO ISSUANCE OF RULE FROM GERRY A. DAVIS, SR., DANNY KEPLINGER, AND TIMOTHY ROHRBAUGH, ET AL,** with the Clerk of the Supreme Court of Appeals, and have served an exact copy of the same on the attorneys for the Petitioner, on the unrepresented Respondent, and on the attorneys for the remaining Respondent by depositing true copies thereof into the United States mail, postage prepaid, in envelopes addressed to them as follows:

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on this the 24th day of March, 2008.

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